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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

SCOTT MATTHEW HUCKE,

Petitioner,

v.

STATE OF OREGON,

Respondent,

and

HARL H. HAAS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a state court judge precluded, pursuant to the automatic stay provisions of 11 U.S.C. Section 362(a), from revoking Petitioner's probation, when the only objective "violation" of the terms and conditions of probation was the non-payment of restitution except as provided for in Petitioner's confirmed Chapter 13 Plan?

2. Do the provisions of 11 U.S.C. Section 362(b)(1) permit a state court judge to revoke Petitioner's probation, when the only objective "violation" of the terms and conditions of probation was the non-payment of restitution except as provided for in Petitioner's confirmed Chapter 13 Plan?

3. Was Respondent Haas' subjective motivation in revoking Petitioner's probation relevant in determining whether or not Respondent Haas violated the

automatic stay of 11 U.S.C. Section 362(a), when the only "objective" violation was the failure to pay restitution except as provided for in Petitioner's confirmed Chapter 13 Plan?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Scott Matthew Hucke respectfully prays that this Court issue a Writ Of Certiorari to review the judgment and decision of the United States Court of Appeals For The Ninth Circuit, filed May 5, 1993.

OPINIONS BELOW

The published Opinion of the Court of Appeals For The Ninth Circuit (Nelson, T.G., J.) [____ F.2d _____ (9th Cir. 1993)] is attached hereto at Appendix A. The published opinion of the United States District Court For The District Of Oregon (Panner, J.) [128 B.R. 675 (D. Or. 1991)] is attached hereto at Appendix B. The published opinion of the United States Bankruptcy Court For The District Of Oregon (Hess, J.) [127 B.R. 258 (Bankr. D. Or.

1991)] is attached hereto at Appendix C.

JURISDICTION

The Court Of Appeals' opinion reversing the District Court was filed on May 5, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). This Petition For Writ Of Certiorari is filed within the ninety (90) day period prescribed by 28 U.S.C. Section 2101(c) and Supreme Court Rule 13.1 as computed in accordance with Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article Six of the United States Constitution provides in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Law

"of any State to the Contrary notwithstanding."

Other relevant statutes are attached hereto at Appendix D:

11 U.S.C. Section 362(a)
11 U.S.C. Section 362(b)(1)

STATEMENT OF THE CASE

On May 29, 1990, Petitioner entered a guilty plea to the crime of Rape In The First Degree before Respondent Haas in Multnomah County (Oregon) Circuit Court with respect to an incident occurring on December 15, 1989. Judge Haas sentenced Petitioner to five years' probation, with the following conditions: 180 days in jail, anger control counseling, drug/alcohol evaluation, no contact with victim of crime, a $50 penalty assessment, and $21,135 in restitution/compensatory

fines for the victim of the crime. Payment of the financial obligations was to be made in monthly installments of $500 starting two months after the release from custody.

Following Petitioner's release from custody, Petitioner realized that he would not be able to meet the financial obligations imposed by Judge Haas. Accordingly, Petitioner consulted with attorney Todd Trierweiler with respect to the dischargeability of the financial obligations. Pursuant to Mr. Trierweiler's advice, Petitioner filed a Chapter 13 Bankruptcy Petition on October 19, 1990.

Petitioner's Chapter 13 Plan provided that all unsecured creditors (including the financial obligations imposed by Judge Haas) receive a dividend of 20% of what was owed to them over a 36 month period. On January 11, 1991, the Bankruptcy Court entered an Order confirming Petitioner's

Chapter 13 Plan without objection by any creditor.

On January 14, 1991, Judge Haas mailed to Petitioner a letter alleging that he was in violation of the terms and conditions of his probation, and set a date of February 8, 1991 for a probation revocation proceeding. When that letter was received by Petitioner, he was in full compliance with all of the terms and conditions of his probation, except for the payment of the financial obligations imposed by Judge Haas.

On February 4, 1991, Petitioner filed a lawsuit in the District Court seeking a restraining order preventing Judge Haas from conducting the probation revocation hearing on February 8. Ruling that the case was not ripe for decision, the District Court denied Petitioner's Motion, and dismissed his Complaint without

prejudice.

In light of the District Court's ruling, Judge Haas conducted the probation revocation hearing, and subsequently continued that hearing for final consideration to March 1, 1991. At the conclusion of the March 1 hearing, Judge Haas found Petitioner in violation of his probation for his failure to make the required payments on his restitution obligations (except as provided for in his Chapter 13 Plan), revoked Petitioner's probation, and sentenced him to a term of three years' incarceration.

On March 22, 1991, Petitioner filed an Adversary Complaint with the Bankruptcy Court seeking his release from incarceration. On May 7, 1991, the Bankruptcy Court issued an opinion voiding the state court judgment revoking Petitioner's probation, holding that the

revocation violated the automatic stay provisions of 11 U.S.C. Section 362(a). Unsure as to whether the Bankruptcy Court had the authority to order Petitioner's release, it forwarded a recommended Order to the District Court requiring that Petitioner be released from custody.

Following the Bankruptcy Court's ruling, Respondents appealed to the District Court, and renewed their Motion For Withdrawal Of Reference. The District Court entered an opinion on July 11, 1991 in effect affirming the ruling of the Bankruptcy Court, and entered an Order requiring Plaintiff's release from custody. Respondents then appealed the District Court's ruling to the Ninth Circuit Court Of Appeals. On May 5, 1993, the Ninth Circuit reversed the District Court, and remanded with instructions to dismiss Plaintiff's Adversary Complaint.

On May 21, 1993, Petitioner obtained an Order from the Ninth Circuit staying its mandate until June 28, 1993. This Petition For Writ Of Certiorari followed.

REASONS TO ALLOW THE WRIT

I. The Ninth Circuit's Decision Below Is In Conflict With This Court's Decision In Pennsylvania Department Of Public Welfare v. Davenport.

In Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990), this Court held that restitution obligations were "debts" within the meaning of 11 U.S.C. Section 101(12), and therefore dischargeable upon the completion of a Chapter 13 Bankruptcy case. In that case, while it appears that the Davenports attempted to prevent the probation department from instituting proceedings to revoke probation, the case centered on

whether or not restitution obligations were "debts" capable of being discharged in Chapter 13. Nonetheless, this Court clearly stated its opinion as to the propriety of revoking probation for failing to pay restitution.

> "Moving beyond the language of [11 U.S.C. Sect.] 101, the United States, appearing as amicus in support of petitioners, contends that other provisions in the Code, particularly the exception to the automatic stay provision, [Section] 362(b)(1), and Chapter 7's distribution of claims provisions, [Section] 726, reflect Congress' intent to exempt restitution orders from discharge under Chapter 13. We are not persuaded, however, that the language or the structure of the Code as a whole supports that conclusion.
>
> "Section 362(a) automatically stays a wide array of collections and **enforcement** proceedings against the debtor and his property. Section 362 (b)(1) exempts from the stay 'the commencement or continuation of a criminal action or proceeding against a debtor.' According to the Senate Report, the exception from the automatic stay ensures that '[t]he bankruptcy laws are not a haven for criminal offenders.' Section 362(b)(1) does not, however, . . .

"exempt governmental efforts to collect restitution obligations from a debtor. Cf. 11 U.S.C. [Section] 362(b)(2) (collection of alimony, maintenance or support is not barred by the stay). Nonetheless, the United States argues that it would be anomalous to construe the Code as eliminating a haven for criminal offenders under the automatic stay provision while granting them sanctuary from restitution obligations under Chapter 13.

"We find no inconsistency in these provisions. Section 362(b)(1) ensures that the automatic stay provision is not construed to bar federal or state prosecution of alleged criminal offenses. **It is not an irrational or inconsistent policy choice to permit prosecution of criminal offenses during the pendency of a bankruptcy action and at the same time to preclude probation officials from enforcing restitution orders while a debtor seeks relief under Chapter 13**. Congress could well have concluded that maintaining criminal prosecutions during bankruptcy proceedings is essential to the functioning of government but that, in the context of Chapter 13, a debtor's interest in a full and complete release of his obligations outweighs society's interest in collecting or **enforcing** a restitution obligation outside the agreement reached in the Chapter 13 Plan." Id. at ____ [Slip Opinion at 6-7], 110 S.Ct. at 2131-2132. (Emphasis added; citations omitted.)

In light of the preceding language from Davenport, it has been this Court's ruling that a governmental agency can neither collect nor enforce a restitution obligation following the filing of a Chapter 13 Bankruptcy Petition. Moreover, this Court also noted that enforcement can take the form of "the substantial threat of revocation of probation and incarceration." Id. at ____, 110 S.Ct. at 2131.

The Ninth Circuit's opinion below focused only on the collection issue. It held that because Judge Haas was no longer seeking to collect money from Petitioner that the automatic stay of Section 362(a) was not applicable. It is critical to remember, however, that enforcement means more than the collection of money, and that the post-petition enforcement of a judgment is specifically prohibited by the terms of 11 U.S.C. Section 362(a)(2). This Court's

opinion in Davenport clearly stated that collection and enforcement of restitution obligations were prohibited following a Chapter 13 filing, and that revocation of probation constitutes "enforcement" of the obligation. The Ninth Circuit's attempt to distinguish Davenport by stating that Judge Haas refused an offer to repay most or all of the restitution through the bankruptcy Plan misses the point that enforcement of a judgment means more than the mere collection of money.

If the provisions of the automatic stay were to be construed to allow for the discharge of restitution obligations upon the completion of a Chapter 13 Plan, but also to allow for criminal punishment for such a discharge, the protections of the automatic stay would be meaningless. Such a construction would, in Judge Hess' words, "emasculate the holding in Davenport." In

Re Hucke, 127 B.R. 258, 262 (Bankr. D. Or. 1991).

II. The Ninth Circuit's Decision Below Allows For Unfettered Discretion By The State Court Judge.

Judge Haas' position (adopted by the Ninth Circuit) during this entire matter has been that Petitioner's probation was revoked not because of the bankruptcy filing, but because "the purposes of probation were not being served". Judge Haas felt that Petitioner was no longer a suitable candidate for probation, and therefore deserved to have his probation revoked.

Judge Haas filed an Affidavit with the Bankruptcy Court containing the following statement:

> "Mr. Hucke's probation was revoked, not because he failed to make payments as required by the terms of his probation, but because he has demonstrated since being sentenced to probation that the purpose of probation is not being served and that

> "he is not an appropriate candidate for probation. His decision to discharge his restitution obligation is merely evidence of the inappropriateness of probation." (Excerpt of Record at page 98.)

This statement notwithstanding, nowhere does Judge Haas state why continued probation was not appropriate, except for Petitioner's failure to pay his restitution obligation. Judge Haas has argued that probation was revoked because of a lack of compassion or sympathy to the victim of the crime, but the only basis upon which he concludes that Petitioner is not sympathetic is the failure to pay restitution and the filing of the Chapter 13 Bankruptcy. No facts about Petitioner changed from the time of the original sentencing to the time of the probation revocation hearing (Judge Haas was aware of the "horrendous psychological evaluation" prior to sentencing), and Judge Haas'

attorney conceded before the Bankruptcy Court that the probation revocation hearing would never have been instituted had Petitioner continued to pay on his restitution obligation. Hucke, supra at 262.

Regardless of which position this Court might find more credible, a proper interpretation of this matter would render the state court judge's subjective motivation in revoking probation irrelevant. The proper focus would be on the "objective" violations of probation. As Judge Hess aptly noted below, focusing on the subjective motivation places unfettered discretion in the hands of the state court judge, and puts the probationer in a "no-win" position.

> "Recognizing that the ruling in Davenport would prohibit revocation on that basis, however, [Respondents] argue that objective facts supporting the revocation of probation need not

"be present, rather, that the subjective motive behind revoking probation is critical. [Respondents] contend that the motive was not debt collection but rather to protect society's interests.

"If that argument prevails, a debtor with a restitution obligation would never be able to successfully assert that his probation was revoked for failure to pay. Instead, the state would always be able to assert, as it has done in this case, before or after the fact, that, despite the fact that no condition of probation was violated except the failure to pay, the true reason for revoking probation was not non-payment but, rather, some subjective standard that the probationer failed to meet. Unfortunately, only the state court judge would be able to set that standard and evaluate the probationer's performance against that unarticulated standard. It is apparent that [Respondents'] analysis of this issue would, as a practical matter, overrule the holding in Davenport and render the automatic stay ineffective in this context." Id. at 262-263.

III. The Ninth Circuit's Decision Below Ignores The Force And Effect Of The Supremacy Clause

The Ninth Circuit concluded in its opinion that the revocation of probation

was permissible because it was allegedly consistent with Oregon law. Contrary to the statement of the Ninth Circuit, however, the case at bar is not one involving an appeal from a state court's decision. Petitioner contends that the state court acted without authority because its actions were pre-empted by federal bankruptcy laws. If federal law prohibits an act, no state authority can authorize it. Federal bankruptcy laws pre-empt any state laws or regulations which might interfere with the automatic stay statutes. In Re Claussen, 118 B.R. 1009 (Bankr. D.S.D. 1990). See also United States Constitution, Article Six:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; **and the Judges in every state shall be bound thereby, any Thing in the Constitution or Law**

"**of any State to the Contrary notwithstanding**." (Emphasis added.)

CONCLUSION

As stated herein, the Ninth Circuit's ruling below is in direct conflict with this Court's decision in Davenport. In light of Davenport's holding that restitution debts are dischargeable upon the completion of a Chapter 13 Plan, it naturally follows that a state cannot revoke probation for filing a Chapter 13 Bankruptcy Petition to adjust such debt.

This Court should reject Respondents' argument that review should be denied because the law regarding the dischargeability of restitution debt has been changed. (See Memorandum In Opposition To Motion For Stay of Mandate at 2 [filed with the Ninth Circuit].) While the law concerning dischargeability has indeed been

changed by Congress in response to the Davenport decision, important issues as stated herein remain which merit review by this Court: What is the interrelationship between the automatic stay provision of 362(a)(2) and the exception contained in 362(b)(1)? Does state law or federal law control in cases such as these? Must there be an objective basis for revoking probation other than a failure to pay restitution?

Despite the change in the law, a situation could well arise where a bankruptcy debtor with a restitution debt files a Chapter 13 Bankruptcy Petition, and proposes to repay the debt in full, albeit on different terms than those ordered by a state court judge. Concerns surrounding the state court's ability to revoke probation in that type of circumstance would remain, and should be settled by this

Court.

For the reasons set forth herein, this Court should issue a Writ Of Certiorari in this case to review the decision of the United States Court Of Appeals For The Ninth Circuit.

Respectfully submitted this 7th day of July, 1993.

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NOTES

1. Respondents strongly contest Petitioner's assertion that his probation was revoked because of the Chapter 13 Bankruptcy filing. Respondents' position (which was adopted by the Ninth Circuit) is that Petitioner's probation was revoked because the purposes of probation were no longer being served. As will be discussed infra, it is Petitioner's position that the facts of the case clearly demonstrate that Petitioner was in fact being punished for filing a bankruptcy petition. Notwithstanding this position, Petitioner contends that Judge Haas' subjective motivation underlying the revocation of probation is irrelevant to the issue of whether or not the revocation constituted a violation of the automatic stay provided for by 11 U.S.C. Section 362(a). Petitioner would urge this Court to find such subjective motivation irrelevant when there are no "objective" violations of the terms and conditions of probation.

2. "However, if the probation hearing had as its aim the collection of the fine, then it would run afoul of [Section] 362(a)(6), which stays acts intended to 'collect, assess or recover a claim' against the debtor." Ninth Circuit Slip Opinion at 4432.

3. The restitution obligation imposed by Judge Haas was reduced to a "money judgment" pursuant to the state court's original sentencing order dated May 31, 1990. (See Respondents' "Excerpt of the Record" before the Ninth Circuit at page 34.)

4. As noted before the Ninth Circuit, a debt listed on a Chapter 13 Bankruptcy Petition is discharged only upon the completion of the Chapter 13 Plan. See 11 U.S.C. Section 1328.

5. In fact, the record below is replete with statements from Judge Haas from which a reasonable person could conclude that Petitioner was being punished for filing bankruptcy. See Appellee's Brief before the Ninth Circuit at pages 11-15.

6. See also District Judge Panner's decision in In Re Hucke, 128 B.R. 675, 678 (D. Or. 1991): "There is no dispute that, but for the bankruptcy filing, there would have been no revocation hearing. There is also no dispute that the only condition of probation [Petitioner] 'violated' was his failure to pay restitution."

7. Compare former and present versions of 11 U.S.C. Section 1328. Following this Court's ruling in Davenport, Congress amended Section 1328 to eliminate the dischargeability of restitution debts in Chapter 13. P.L. 101-581, 104 Stat. 2865, Act of November 15, 1990.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCOTT MATTHEW HUCKE, Plaintiff--Appellee,	)	
v.	)	No. 91-35876
STATE OF OREGON, Defendant--Appellant,	)	D.C. No. CV-91-00672-OMP
and	)	OPINION
HARL HAAS, Defendant--Appellant.	)	

Appeal from the United States District Court for the District of Oregon

Owen M. Panner, Chief District Judge, Presiding

Argued and Submitted

January 5, 1993--Portland, Oregon

Filed May 5, 1993

Before: Dorothy W. Nelson, Stephen S. Trott, and Thomas G. Nelson, Circuit Judges.

App. 2

Opinion by Judge T.G. Nelson

OPINION

T.G. NELSON, Circuit Judge:

This case presents a conflict between a federal bankruptcy proceeding and a state criminal proceeding, in which the bankruptcy court opinion (as applied by the federal district court) effected the release of an Oregon State prisoner convicted of rape by voiding the State's probation revocation. We vacate and remand.

FACTS AND PROCEDURAL HISTORY

On the night of December 15, 1989, Appellee Scott Matthew Hucke and his friend David Stone forcibly raped a young woman. On May 29, 1990, Hucke pleaded guilty to rape in the first degree in the Circuit Court of the State of Oregon in accordance with a plea agreement whereby the district attorney agreed to seek a maximum of five

years probation (rather than the thirty-six months prison sentence that could have been imposed) and to recommend a downward departure from the state's sentencing guidelines. Presiding over the sentencing proceedings was Appellant Harl H. Haas, in his capacity as a Circuit Judge of that court. Although reluctant to abide by the stipulation because of the "heinous nature of the crime" and its "substantial and long-term effects on the victim", Judge Haas finally agreed to its terms on the express condition that Hucke pay a $20,000 compensatory fine to the victim. The court noted that it retained jurisdiction to impose the thirty-six month sentence should Hucke violate conditions of probation. Judge Haas placed Hucke on probation for sixty months and, in addition to the compensatory fine, imposed $1,135 in restitution and a penalty assessment of

$50. The fines were payable at $500 per month, commencing two months after release from custody.

Hucke spent approximately forty days in a halfway house, and was released at the end of July. He made no payments on the obligations imposed by the probation. Instead, on October 10, 1990, he filed a petition in bankruptcy under Chapter 13 of the Bankruptcy Code.

Hucke's Chapter 13 plan, as confirmed on January 11, 1991, provided for payments of twenty percent of the debt to each of his creditors. In addition to the $21,185 due under the criminal judgment, Hucke listed $3,043 to his lawyer in the criminal case, $3,805 in student loans, and $150 in medical bills. His petition showed gross annual income of $28,000, a monthly take-home of $1,828, and expenses of $1,620, including $400 in alimony, for a monthly

"surplus" of $208, which went to the bankruptcy plan's $200 per month payment to creditors.

On January 14, 1991, the state court notified Hucke that he was in violation of probation and set a probation revocation hearing for February 8, 1991. Hucke filed an action in federal district court seeking to enjoin the state hearing. On February 7, 1991, the federal district court denied Hucke's application for a restraining order ruling that there was no "case or controversy" sufficient for federal jurisdiction.

Hucke appeared at the state probation revocation hearing on February 8th with his new criminal defense attorney. Judge Haas continued the proceedings to give Hucke's attorney time to familiarize himself with the case (including Hucke's "horrendous psychological evaluation"), and to propose

an alternative sentence. Judge Haas explained,

> I don't intend to punish the defendant for filing bankruptcy. I just have to have a sentence that makes sense. And as we stand here right now, the compensatory fine has been removed as an option for this court, and I accept that. The question is. . . what are alternatives to that option?

At the continuation hearing on March 1, 1991, Hucke's attorney argued that rather than revoke probation, Judge Haas should accept a modification of the bankruptcy plan so that most, and possibly all, of the compensatory fine would be paid. Judge Haas rejected this suggestion. In reviewing Hucke's suitability for probation, Judge Haas stated,

> this crime that he committed under the laws of the State of Oregon is presumptively a penitentiary offense, 36 months. It takes extraordinary reasons to depart from that. The defendant has destroyed the ability of this court to fashion a sentence that would permit that to occur; secondly, he's destroyed his credibility with this court; and

> thirdly, he'd demonstrated to me he continues to place himself first and this state second, and that he's not a capable candidate for that probationary sentence, that I have no way to fashion one that would be satisfactory that would indicate that we wouldn't be just going through this all again.

On March 5, 1991, Judge Haas found Hucke to be in violation of the probation, and resentenced him to thirty-six months imprisonment.

The same day, Hucke filed an amended plan in the Chapter 13 proceeding which provided for one-hundred percent payment of the amount required under the probation order. This plan was approved by the Chapter 13 trustee. The record before this court does not show whether the amended plan was confirmed by the bankruptcy court.

On March 22, 1991, Hucke filed an adversary proceeding in the Chapter 13 case against the State of Oregon and Judge Haas arguing that federal bankruptcy law, which

imposes an automatic stay of all judicial proceedings brought against a debtor who has filed for Chapter 13 bankruptcy, required that the state court's revocation of Hucke's probation be void as having violated the automatic stay. On May 7, 1991, the bankruptcy court granted Hucke's motion for summary judgement, ruling that the State could not revoke Hucke's probation. In Re Hucke, 127 B.R. 258 (Bankr. D. Or. 1991) ("Hucke I"). The bankruptcy judge held that the probation revocation was a debt collection matter within the preemptive jurisdiction of the bankruptcy court because it was caused by Hucke's failure to pay his compensatory fine. Id. at 262. Pursuant to the automatic stay provision of 11 U.S.C. [Section] 362(a), the bankruptcy court declared Judge Haas' probation order to be void. Id. at 267.

The bankruptcy judge forwarded his opinion to the United States District Court with a proposed order for Hucke's immediate release for the district court to adopt. In Re Hucke, 128 B.R. 677 (Bankr. D. Or. 1991) ("Hucke II"). The State of Oregon and Judge Haas filed objections, appealed the bankruptcy court's order, and moved for withdrawal of reference from the bankruptcy court. Id. The district court, agreeing with the reasoning of the bankruptcy court's opinion, withdrew the reference to the bankruptcy court, declared Judge Haas' revocation order to be void, and ordered Hucke's immediate release from prison.

This court has jurisdiction of the timely appeal brought by the State and Judge Haas pursuant to 28 U.S.C. [Section] 1291.

DISCUSSION

As a preliminary matter, we note that

the bankruptcy court was authorized to discharge Hucke's restitution debt at the time he filed for Chapter 13 protection. In Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990), the Supreme Court held criminal restitution obligations were dischargeable in a Chapter 13 proceeding. Although Congress subsequently amended the bankruptcy code to overrule Davenport, the amendment does not apply to the present case which was commenced some thirty-six days before the effective date of the enactment. See 11 U.S.C. [Section] 1328(a)(3) (as added by Act of November 15, 1990, P.L. 101-581, 104 Stat. 2865).

Under 11 U.S.C. [Section] 362(a) of the bankruptcy code, when a Chapter 13 petition for bankruptcy is filed, judicial proceedings against either the debtor or property of the estate which arose before the commencement of the case are

automatically stayed. **(Note 1)** Thus, the issue presented in this case is whether the state court's order revoking probation was a proceeding controlled by the automatic stay provisions of 11 U.S.C. [Section] 362(a).

An exception to the automatic stay provisions provides that the stay does not apply to "the commencement or continuation of a criminal action or proceeding against a debtor." 11 U.S.C. [Section] 362(b)(1). Certainly, the mere institution of a probation revocation proceeding, without more, would constitute a continuation of a criminal proceeding against the defendant/debtor and, thus, be exempt from the automatic stay (as distinguished from a civil debt collection action, which could not be instituted nor continued after the stay went into effect). However, if the probation hearing had as its aim the

collection of the fine, the it would run afoul of [Section] 362(a)(6), which stays acts intended to "collect, assess or recover a claim" against the debtor. In sum, if the present state revocation proceeding constituted collection efforts, then it would violate the automatic stay and would be void. On the other hand, if that proceeding were not a collection effort, the it would be a "continuation of a criminal action or proceeding against a debtor" and exempt from the stay.

In this case, Hucke had no monetary obligation under the judgment imposing the prison sentence. In fact, Hucke's restitution obligation was completely canceled; he did not have to make even the twenty percent listed in his Chapter 13 plan. Judge Haas made it very clear during the revocation proceedings that he was not interested in collecting the fine, that he

did not intend to punish Hucke for filing bankruptcy, and that the compensatory fine was no longer an option. Judge Haas rejected the offer of Hucke's counsel to restructure the Chapter 13 plan so that payments on the compensatory fine would come close to one hundred percent of the total amount imposed. Therefore, the revocation proceeding did not operate as a collection device and was rather a "continuation of a criminal action", an exception to the automatic stay provisions. See 11 U.S.C. [Section] 362(b)(1).

In Hucke I, the bankruptcy court held that the only violation of probation was Hucke's failure to pay the restitution fine and, thus, the probation revocation contravened the automatic stay. 127 B.R at 263. The district court appears to have adopted this reasoning. Hucke II, 128 B.R. at 678. Here is where we part company with

the district court. The reasoning does not consider state law relating to judicial authority over probation. Under Oregon law, probation can be revoked either for a violation of the conditions of probation or if the purposes of probation are not being served. Barker v. Ireland, 392 P.2d 769, 771 (Or. 1964) ("It is not necessary to revocation that the person be convicted of a new crime, but only that the trial judge be satisfied that the purposes of probation are not being served, or that the terms thereof have been violated.") "Probation is not a matter of right, but a matter of discretion. Probation is granted, withheld, or revoked in the exercise of the judicial discretion of the trial judge, guided by a balancing of considerations of public safety and rehabilitation of persons convicted of crime." Id. (emphasis added); see also State v. Rout, 477 P.2d 230, 232

(Or. Ct. App. 1970).

In the present case, Judge Haas did not resentence Hucke solely because Hucke failed to pay the fine, as the bankruptcy court asserts, but because the purpose of Hucke's probation was not being served. Under Oregon law, rehabilitation is one of the primary purposes of probation. Barker, 392 P.2d at 771. Judge Haas stressed that Hucke's rehabilitation could only be demonstrated by remorsefulness and a sense of responsibility ("I have to know if a defendant is remorseful, if a defendant has a sense of responsibility, if he cares about the victims's rights before I can say if he is rehabilitated"). Judge Haas believed that in attempting to avoid paying restitution by filing for Chapter 13 relief, Hucke demonstrated a callous disregard for the victim and the judicial system ("as soon as he got out of jail. .

.he rushed to the arms of two new attorneys and filed bankruptcy. . .[t]o defeat the claim of the compensatory fine. . . .[H]e continues to place himself first and his victim and this state second [thereby showing] that he's not a capable candidate for a probationary sentence"). Thus, contrary to the bankruptcy court's finding, Hucke's failure to pay the restitution was not the only violation of probation. A state court judge may revoke probation at any time if the purposes of probation are not being met, and Judge Haas made such a judgment here. Hucke is asking this court to tell a state court judge that he no longer has this discretionary authority once a defendant files for bankruptcy. This outcome is untenable.

We conclude the resentencing was not a collection effort because (1) Hucke had no monetary obligation under the new judgment,

and alternatively, (2) the resentencing was a proper effort of the part of Judge Haas to fashion a remedy that would serve the purposes of probation. Therefore, the revocation was a continuation of a criminal proceeding and not subject to the provisions of the automatic stay.

Relying on Davenport, Hucke argues that the revocation proceedings did not fall into the exception of [Section] 362(b)(1) relating to the commencement against the debtor because it constituted the enforcement of a debt. See, e.g., Davenport, 495 U.S. at 560 ("Section 362(b)(1) does not, however, explicitly exempt governmental efforts to collect restitution obligations from a debtor. . . .It is not an irrational or inconsistent policy choice to permit prosecution of criminal offenses during the pendency of a bankruptcy action and at the same time to

preclude probation officials from enforcing restitution orders while a debtor seeks relief under Chapter 13.").

Hucke's case is quite different factually than Davenport on the enforcement issue. The state court in Davenport expressly refused to obey the bankruptcy court order which included the restitution obligation as part of the Chapter 13 debt. Here, the state court made no attempt to collect the restitution debt, and in fact rejected an offer which would have resulted in payment of most, if not all, of the restitution. Moreover, Davenport did not say that a state court cannot revoke a probation where its reasons for doing so are unrelated to an intent to collect the debt. Such a reading of Davenport would indeed make the bankruptcy laws "a haven for criminal offenders." Id. (quoting S. Rep. No. 95-989, p. 51 (1978)).

Hucke also contends that Judge Haas' actions were not authorized under state law. However, neither this court nor the district court is authorized to consider this issue; the Supreme Court of the United States is the only federal court authorized to consider appeals of state court decisions, and then only on federal issues. Elks Nat'l Foundation v. Weber, 942 F.2d 1480, 1483 (9th Cir. 1991), cert. denied, 112 S.Ct. 2995 (1992).

The state court acted within its discretion in revoking Hucke's probation. There was no violation of the Bankruptcy Code's automatic stay. The district court's order releasing Hucke is VACATED. We REMAND the case to the district court with instructions to dismiss Hucke's adversary proceeding. **(Note 2)** VACATED AND REMANDED.

Notes

1. 11 U.S.C. [Section] 362(a) provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS [Sections] 301, 302 303]. . .operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title [11 USCS [Sections] 101 et seq.], or to recover a claim against the debtor that arose before the commencement of the case under this title [11 USCS [Sections] 101 et seq.];

(2) the enforcement, against the debtor or against property of the debtor, of a judgment obtained before the commencement of the case under this title. . .

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or

> enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title. . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. . .
>
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title. . .against any claim against the debtor; and
>
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

2. In so holding, we need not reach the merits of the State's habeas corpus/exhaustion of state remedies argument inasmuch as it is not a jurisdictional question. See generally Frisbie v. Collins, 342 U.S. 519, 521 (1952) (district courts may deviate from state exhaustion rule in special circumstances).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In Re SCOTT MATTHEW HUCKE, Debtor.	)	Bankruptcy Case No. 390-35394-H13
SCOTT MATTHEW HUCKE, Plaintiff, v. STATE OF OREGON, by and through the Division of Corrections, Department of Human Resources; and HARL H. HAAS, individually and in his capacity as a Circuit Court Judge for the Fourth Judicial District, State of Oregon, Defendants.	)	Adversary Case No. 91-3124 USDC CV No. 91-672-PA AMENDED OPINION

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PANNER, J.

Plaintiff, a debtor in bankruptcy, brings this adversary action seeking his release from state custody for a probation violation. I find the state in violation of the automatic stay of the Bankruptcy Code and direct plaintiff's release from custody.

FACTUAL BACKGROUND

On May 29, 1990, plaintiff, Scott Hucke, pleaded guilty to first degree rape. Multnomah County Circuit Court Judge Harl

H. Haas sentenced plaintiff to five years' probation. Judge Haas also ordered plaintiff to pay the Multnomah County Court Administrator's Office a $50 penalty assessment, $1,135 restitution to the victim, and a $20,000 compensatory fine.

On October 10, 1990, plaintiff filed a petition for relief under Chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Oregon. Plaintiff listed the Office of the Multnomah County Court Administrator and three other unsecured creditors on his schedules. Plaintiff's plan proposed to pay his creditors, including the Court Administrator, approximately 20% of his debt under a three-year plan. No creditors appeared at the meeting of creditors, and none filed objections. On January 11, 1991, the Bankruptcy Court confirmed plaintiff's plan.

No creditor sought or obtained relief from the automatic stay imposed by 11 U.S.C. [Section] 362(a).

On January 14, 1991, Judge Haas sent plaintiff a letter alleging plaintiff was in violation of his probation, and scheduling a probation revocation hearing. On February 5, 1991, plaintiff filed an action in this court seeking to enjoin Judge Haas from conducting the probation revocation hearing. District Judge James A. Redden denied the motion and dismissed the action without prejudice. (No. CV91-117-RE, Feb. 8, 1991).

On February 8, and March 1, 1991, Judge Haas conducted the probation revocation hearing. Representing the state, the deputy district attorney explained to the court:

> The case before the court is a probation violation hearing, the defendant having failed to comply

with the court order of payment of restitution.

Judge Haas found plaintiff in violation of his probation. Judge Haas revoked probation and sentenced plaintiff to three years' imprisonment. Plaintiff was immediately incarcerated and is now serving that sentence.

Plaintiff brought this adversary action in Bankruptcy court against the State of Oregon and Judge Haas **(Note 1)** for violating the automatic stay of the Bankruptcy Code. Granting plaintiff's motion for summary judgment, Henry L. Hess, Jr., United States Bankruptcy Judge, entered an Order declaring "void" the state court's judgment revoking probation.

According to Judge Hess, the following is undisputed: (1) But for plaintiff's failure to pay, there would have been no revocation hearing; and (2) there is no

evidence of any problem with plaintiff's conduct while on probation other than plaintiff's failure to pay. (Opinion at 8). The materials submitted to this court do not contradict those facts.

Judge Hess held that the subjective motive behind revoking plaintiff's probation is irrelevant. "[W]here the state can point to no violation of the conditions of the probation obligation after filing a [chapter 13 bankruptcy], resentencing is prohibited by the automatic stay." (Opinion at 10).

PROCEDURAL ISSUES

Judge Hess declined to order plaintiff's release. Instead, Judge Hess forward his opinion to this court with a proposed order for this court to adopt his findings and conclusions and order the immediate release of plaintiff. The State of Oregon filed objections and an appeal

from Judge Hess' Order and filed a motion for withdrawal of reference from the Bankruptcy Court. Plaintiff filed a motion seeking expedited consideration of the order to release plaintiff from custody.

An adversary proceeding in a bankruptcy case can reach the district court in three different ways. First, one or both of the parties can appeal a final decision concerning a "core" matter of the bankruptcy court. 28 U.S.C. [Section] 158. Second, sua sponte, or on the motion of a party, the district judge can withdraw its reference to the bankruptcy court pursuant to 28 U.S.C. [Section] 157(d). Third, the bankruptcy judge can submit to the district court its proposed findings of fact and conclusions of law concerning any bankruptcy-related matter that is not a "core" matter. The district court will then review de novo any matter to which any

party has filed objections. 28 U.S.C. [Section] 157(c)(1).

Here, it is uncertain whether this court is sitting on appeal, entertaining objections, or acting at the request of the bankruptcy judge.

To clear up the procedural confusion, I grant defendant's motion for withdrawal of reference from the bankruptcy court. 28 U.S.C. [Section] 157(d). I will review this matter de novo.

DISCUSSION

The following legal issues are presented: (1) Whether the state court violated the automatic stay by revoking probation; and (2) Whether plaintiff must exhaust all state court remedies before filing an action in federal court.

1. State Court Remedies

The state argues that plaintiff's claim lies properly as a petition for a

writ of habeas corpus. The state contends that such a petition in this case was untimely because plaintiff did not exhaust his state court remedies. 28 U.S.C. [Section] 2254 provides, in part:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective processes or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

In Preiser v. Rodriguez, 411 U.S. 475, 488-489 (1973), the Supreme Court held that prisoners challenging the duration of their confinement could not circumvent the habeas corpus exhaustion requirement by bringing their cases as civil rights violations under 42 U.S.C. [Section] 1983.

The state argues that since plaintiff is challenging confinement, he must first

exhaust his state court remedies before bringing a habeas action.

Judge Hess rejected that argument on several grounds. First, Judge Hess held that the Bankruptcy Code empowers the Bankruptcy Court to issue any order necessary or appropriate to carry out the provisions of the code. Unlike 42 U.S.C. [Section] 1983, the Bankruptcy Code includes a provision giving the court broad powers. 11 U.S.C. [Section] 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Therefore, according to Judge Hess, a debtor seeking to enforce rights under the Bankruptcy Code is not limited to a petition for writ of habeas corpus.

Second, Judge Hess ruled that, even if habeas corpus is the only procedural

remedy, plaintiff was exempt from exhausting state remedies because of the "existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. [Section] 2254(b). Judge Hess reasoned that the state court appeal process would have been so delayed and uncertain as to render it ineffective.

The state contends that the Bankruptcy Code should be construed no broader than the civil rights laws. The state reasons that, since deprivation of liberty alone is insufficient to waive exhaustion, rights under the Bankruptcy Code should not constitute cause to waive the requirement.

I agree with Judge Hess. Plaintiff's incarceration not only deprives plaintiff his liberty, it interferes with plaintiff's right to meet his obligations under his confirmed bankruptcy plan; it interferes

with the rights of his creditors, including the rape victim; and it interferes with the Bankruptcy Court's administration of the debtor's estate.

Plaintiff charges that the state court judgment was imposed in violation of the federal bankruptcy laws. The specific inquiry in plaintiff's action is whether the state court violated the Bankruptcy Code by incarcerating plaintiff. The viability of the bankruptcy is hanging in the balance. The state should not be permitted to detain plaintiff while the state appellate system takes its time to determine an issue of bankruptcy law. Original jurisdiction of bankruptcy cases is exclusively in the Bankruptcy Court for the district in which the debtor resides.

2. The Automatic Stay

The more significant inquiry is whether the state court violated the

automatic stay of the Bankruptcy Code. The filing of a bankruptcy petition "operates as a stay, applicable to all entities, of. . .any act to collect, assess, or recover a cla.m against the debtor that arose before the commencement of the case under this title." 11 U.S.C. [Section] 362(a)(6). However, it does not operate as a stay "of the commencement or continuation of a criminal action or proceeding against the d debtor." 11 U.S.C. [Section] 362(b)(1).

The state argues that the state's revocation of probation did not violate the stay because the state was not attempting to collect on the debt. Rather, the state revoked probation because the purposes of probation were not being served. The state concedes that the debt is dischargeable through Plaintiff's Chapter 13 plan.

There is no dispute that, but for the bankruptcy filing, there would have been no

revocation hearing. There is also no dispute that the only condition of probation plaintiff "violated" was his failure to pay restitution.

The Supreme Court recently held that a state-imposed restitution obligation arising from a criminal proceeding is a dischargeable debt under chapter 13. Pennsylvania Dep't of Public Welfare v. Davenport, 110 S.Ct. 2126 (1990). In that case, after the discharge order was entered, the state court did not revoke probation, but it found that the debt was still owing.

Judge Hess wrote, it would be incongruous to rule that a restitution debt is dischargeable, but that the automatic stay does not protect a debtor from being punished for providing for such discharge in a chapter 13 plan. I agree. The United States Bankruptcy laws are historically

grounded in protecting citizens from the debtors' prisons existing in 19th Century England.

The state also argues that the probation revocation hearing was a criminal proceeding excepted from the automatic stay. That argument is also unavailing. In Davenport, the Court acknowledges that the automatic stay is not a bar to prosecution of alleged criminal offenses. However, the stay "preclude[s] probation officials from enforcing restitution orders while a debtor seeks relief under Chapter 13." Davenport, 110 S.Ct. at 2132. If the state court could simply jail a debtor who seeks to discharge a restitution obligation, Davenport would be, in Judge Hess' word, emasculated.

Defendant cites the possible chilling effect on future probation sentences if plaintiff is ordered released from jail.

That concern is insignificant. After Davenport and this case, Congress amended the bankruptcy laws to except criminal restitution from discharge under Chapter 13. See Pub. L. 101-581, 104 Stat. 2865 (Nov. 15, 1990) (adding 11 U.S.C. [Section] 1328(a)(3)).

Applying Davenport, the state violated the automatic stay, and the judgment revoking probation is void. In Re Stringer, 847 F.2d 549 (9th Cir. 1988). Accordingly, plaintiff should be released and his plan be permitted to continue.

CONCLUSION

Defendants' motion for withdrawal of reference is granted. Plaintiff's motion for summary judgment is granted, except that the action is dismissed against defendant Haas in his individual capacity. The state court judgment of March 5, 1991, revoking plaintiff's probation is declared

VOID, in violation of 11 U.S.C. [Section] 362(a). Defendants shall immediately cause the release of plaintiff from custody.

DATED this 11th day of July, 1991.

/s/ Owen M. Panner
Owen M. Panner, United States District Court Judge

Notes

1. Plaintiff sued Judge Haas individually and in his official capacity. The Bankruptcy Judge dismissed the action against Judge Haas in his individual capacity. That ruling was uncontested, and I see no reason to disturb it.

APPENDIX C

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re SCOTT MATTHEW HUCKE, Debtor.	No. 390-35394-H13
SCOTT MATTHEW HUCKE, Plaintiff, v. STATE OF OREGON, by and through the Division of Corrections, Department of Human Resources; and HARL H. HAAS, individually and in his capacity as a Circuit Court Judge for the Fourth Judicial District, State of Oregon, Defendants.	Adv. No. 91-3124-H OPINION

This matter came before the court upon the defendants' motion to dismiss and the plaintiff's motion for summary judgment. The defendants are represented by Daniel

Rosenhouse, Assistant Attorney General for the State and the plaintiff is represented by Michael R. Blaskowsky and Todd Trierweiler both of Portland, Oregon.

The complaint herein alleges that, after the plaintiff filed a chapter 13 bankruptcy petition, the state revoked his probation because he failed to pay a restitution obligation according to the terms of the state court's probation order. The prayer seeks an order declaring the state court's judgment revoking the plaintiff's probation to be void as having been entered in violation of the automatic stay provided by 11 U.S.C. [Section] 362(a) and for a mandatory injunction requiring the release of plaintiff from the state correctional facility.

The following facts are undisputed. On May 29, 1990, Multnomah County Circuit Judge Harl Haas sentenced the plaintiff to

a period of probation on certain conditions. Among the conditions was that the plaintiff pay the victim restitution and a compensatory fine.

On October 19, 1990, the plaintiff filed a chapter 13 proceeding in this court. The plaintiff listed the state and three other unsecured creditors. On October 16, 1990, the bankruptcy court notified the state of the filing of the bankruptcy case and the imposition of the automatic stay.

The chapter 13 plan dated 10-8-90 proposed to pay holders of allowed unsecured claims approximately 20% of the amount of their claims over a 36 month period. No objections to the plan or other pleadings were filed by any creditor including the state. On December 17, 1990, the bankruptcy court held a confirmation hearing to consider the debtor's proposed

plan. No creditors appeared at the hearing and the court confirmed the plan by an order dated 1-11-91. The confirmation order was not appealed. The state has never filed in this case a motion for relief from automatic stay of 11 U.S.C. [Section] 362(a).

On January 14, 1991, the state court caused a letter to be mailed to plaintiff. The letter alleged that the plaintiff was in violation of the conditions of his probation and ordered him to appear in Multnomah County Circuit Court for a hearing to consider revocation of his probation.

On February 8, 1991, the plaintiff appeared as ordered. At the hearing, Mr. Jim McIntyre, Deputy District Attorney, appeared on behalf of the State of Oregon. Mr. McIntyre's opening statement included the following:

"The case before the court is a probation violation hearing, the defendant having failed to comply with the court order of payment of restitution."

After some discussion about the reasons for the plaintiff's failure to pay the court-ordered restitution, the hearing was continued to March 1, 1991.

On March 1, 1991, the probation revocation hearing was resumed.

Thereafter, on March 5, 1991, the state court entered a judgment revoking the plaintiff's probation and sentencing him to 36 months confinement at the Oregon State Corrections Facility. The plaintiff is currently incarcerated at that facility.

The defendant filed a motion to dismiss the complaint on the ground that the complaint fails to state a claim for relief and that this court is without jurisdiction to determine the matter. The defendants' memorandum in support of the

motion to dismiss clarifies the grounds for the motion. This opinion addresses those grounds as well as the plaintiff's motion for summary judgment.

A. Does the Automatic Stay Prohibit the State Court from Revoking the Plaintiff's Probation?

Upon the filing of a petition in bankruptcy, a federal restraining order is automatically imposed against all entities to prohibit the commencement or continuation of a judicial proceeding against the debtor that was or could have been commenced before the bankruptcy case was filed or to recover a claim against the debtor that arose before the filing of the bankruptcy petition. 11 U.S.C. [Section] 362(a). This federal law preempts any contrary state law and is the supreme law of the land pursuant to the United States Constitution and well-recognized principles of constitutional law. In other words,

where state and federal law conflict, state law must fail. See, e.g., International Longshoremen's Association, AFL-CIO v. Davis, 476 U.S. 380, 393, 106 S.Ct. 1904 (1986).

The defendants argue that: "The automatic stay has nothing to do with this case." Defendants' Reply Memorandum Re Motion to Dismiss, p. 3. In support of this statement, the defendants urge that the probation revocation action was excepted from the automatic stay pursuant to 11 U.S.C. [Section] 362(b)(1) which excepts the commencement or continuation of a criminal action or proceeding against the debtor. Thus, the defendants recognize that, in fact, a determination of the scope of the automatic stay is vital to this case.

In Pennsylvania Dept. of Public Welfare v. Davenport, ____ U.S. ____, 110

S.Ct. 2126 (1990), the United States Supreme Court held that restitution is a "debt" as that term is used in [Section] 1328(a) and [Section] 101(11). Accordingly, the Supreme Court held that a state-imposed restitution obligation arising from a criminal proceeding is a dischargeable debt under chapter 13.

According to the Supreme Court in Davenport, a restitution obligation is a "debt" as defined in [Section] 101(11). The term "debt" is defined as "liability on a claim." Id. It therefore follows that restitution is a "claim" under [Section] 101(4). Since a restitution obligation is a "claim", it is subject to the provisions of [Section] 362(a) which prohibit commencing or continuing actions to collect a "claim".

It would be incongruous to rule that a restitution obligation can lawfully be

provided for in a chapter 13 plan (and discharged upon completion of the payments required under the plan), but that the automatic stay does not protect the debtor from punishment for doing so. This result runs completely contrary to the underlying principle of chapter 13 bankruptcy: That a debtor should be granted relief from collection efforts while he attempts to repay his creditors over time and to the best of his ability so that he may obtain a fresh start. Such a result would eviscerate those remaining chapter 13 cases involving dischargeable restitution debts by making it impossible for the debtor to comply with the terms of a confirmed plan where his probation has been revoked and he is incarcerated with no means to complete the plan.

The language used in Davenport clearly indicates the Supreme Court's view

concerning probation revocation proceedings based on the debtor's failure to pay a restitution obligation:

> Moving beyond the language of [Section] 101, the United States, appearing as amicus in support of petitioners, contends that other provisions in the Code, particularly the exemption to the automatic stay provision, [Section] 362(b)(1), and Chapter 7's distribution of claims provision [Section] 726, reflect Congress' intent to exempt restitution orders from discharge under chapter 13. We are not persuaded, however, that the language or the structure of the Code as a whole supports that conclusion.
>
> Section 362(a) automatically stays a wide array of collection and enforcement proceedings against the debtor and his property. Section 362(b)(1) exempts from the stay "the commencement or continuation of a criminal action or proceeding against the debtor." According to the Senate report, the exception from the automatic stay ensures that "[t]he bankruptcy laws are not a haven for criminal offenders." S. Rep. No. 95-989, supra, at 51. Section 362(b)(1) does not, however, explicitly exempt governmental efforts to collect restitution obligations from a debtor. Cf. 11 U.S.C. [Section] 362(b)(2)

("collection of alimony, maintenance, or support" is not barred by the stay). Nonetheless, the United States argues that it would be anomalous to construe the Code as eliminating a haven for criminal offenders under the automatic stay provision while granting them sanctuary from restitution obligations under Chapter 13. (footnote omitted.)

We find no inconsistency in these provisions. Section 362(b)(1) ensures that the automatic stay provision is not construed to bar federal or state prosecution of alleged criminal offenses. It is not an irrational or inconsistent policy choice to permit prosecution of criminal offenses during the pendency of a bankruptcy action and at the same time to preclude probation officials from enforcing restitution orders while a debtor seeks relief under Chapter 13. Congress could well have concluded that maintaining criminal prosecutions during bankruptcy is essential to the functioning of government but that, in the context of Chapter 13, a debtor's interest in full and complete release of his obligations outweighs society's interest in collecting or enforcing a restitution obligation outside the agreement reached in Chapter 13 plan. Id.

The defendants argue that the ruling in Davenport only prohibits actions to

enforce restitution obligations. They further argue that the case at bar was not such an action. According to the defendants, the probation revocation hearing was a "criminal proceeding" under [Section] 362(b)(1) conducted to further the state's interest in protecting its citizens. The defendants argue that the bankruptcy filing and attempt to affect the restitution obligation was merely evidence that the state court judge considered in deciding that the purposes of probation weren't being served.

The defendants continue that, since the plaintiff was attempting to alter the restitution obligation in bankruptcy, he was not demonstrating the appropriate remorse or contrition for his crime and was therefore no longer a candidate for probation. This analysis leads the defendants to conclude that the proceedings

in question were actually criminal in nature and not an effort to enforce payment of a debt.

The problems with this analysis are that it ignores the fact that the hearing would not have occurred but for the plaintiff's failure to pay as ordered and, as a practical matter, it would emasculate the holding in Davenport.

The defendants have never disputed that the plaintiff was summoned to appear in state court for the revocation hearing as a result of his failure to pay. Counsel for the defendants admitted in court that, "but for" the plaintiff's failure to pay, there would have been no revocation hearings in state court. There is nothing in the record to indicate any problem with the plaintiff's conduct since probation was ordered except for the fact of bankruptcy and the plaintiff's subsequent failure to

pay the restitution obligation as ordered by the state court. **(Note 1)**

Recognizing that the ruling in Davenport would prohibit probation revocation on that basis, however, the defendants argue that objective facts supporting the revocation of probation need not be present, rather, that the subjective motive behind revoking probation is critical. The defendants contend that the motive was not debt collection but rather to protect society's interests.

If that argument prevails, a debtor with a restitution obligation would never be able to successfully assert that his probation was revoked for failure to pay. Instead, the state would always be able to assert, as it has done in this case, before or after the fact, that, despite the fact that no condition of probation was violated except the failure to pay, the true reason

for revoking probation was not non-payment but, rather, some subjective standard that the probationer failed to meet. Unfortunately, only the state court judge would be able to set that standard and evaluate the probationer's performance against that unarticulated standard. It is apparent that the defendants' analysis of this issue would, as a practical matter, overrule the holding in Davenport and render the automatic stay ineffective in this context.

In this court's opinion, the subjective motive behind revoking the plaintiff's probation is irrelevant. This court holds that where the state can point to no violation of the conditions of the probation sentencing order other than the failure to pay a restitution obligation after filing a petition under chapter 13 of the Bankruptcy Code, resentencing is

prohibited by the automatic stay.

In this case, then, there is no genuine issue of material fact remaining. The court must conclude that probation was revoked solely because plaintiff exercised his legal right to file a petition in bankruptcy and altered the restitution payment schedule. Thus, under the holding in Davenport, the proceeding in question was not a criminal proceeding and not excepted from the automatic stay.

Therefore, the automatic stay prohibited the defendants from taking any action to collect on the claims in question without first obtaining an order granting them relief from the stay. **(Note 2)**

It is not disputed that the state did not ask for relief from the automatic stay before continuing the judicial proceedings against the plaintiff. Thus, without obtaining relief from the automatic stay,

the state court ordered the plaintiff's probation revoked.

In sum, the actions taken by the state in revoking the plaintiff's probation were in violation of the automatic stay. Actions taken in violation of the stay are void. In Re Stringer, 847 F.2d 549 (9th Cir. 1988). Accordingly, the court will enter an order declaring the judgment revoking the plaintiff's probation void.

Some would argue that this result is undesirable in that a convicted criminal will be allowed to avoid incarceration by filing bankruptcy. This argument has been addressed by the United States Supreme Court in Davenport, supra.

In addition, however, the practical ramifications of the state court proceedings warrant comment. The plaintiff was employed and free on probation when the state court violated the automatic stay and

revoked his probation. The only objective basis for conducting the proceedings and revoking the plaintiff's probation was that he was not paying the restitution obligations according to the terms ordered by the state court.

As previously discussed, there was no allegation or proof that the plaintiff violated any other provisions of his probation or that he was any more of a threat to society than he was when the state ordered him released on probation.

As a result of the state court proceedings, the plaintiff is no longer able to work to repay his creditors (including the victim). The defendants concede that this debt is dischargeable, Memorandum in Support of Defendants' Motion to Dismiss, p. 5, and this court has previously ruled from the bench that a chapter 13 case will not be dismissed for

failure to make payments where the failure was occasioned by circumstances beyond the debtor's control.

Thus, the practical effect of the action of the state court is to require the plaintiff to remain incarcerated for 36 months without making any payment to his victim or other creditors. At the end of that time, his chapter 13 plan will be complete and he will be entitled to a discharge of all his debts, including the restitution obligations, without having paid anything to the victim or to any of his other creditors. In this particular case, it would appear that the interests of the victim and society would be better served by allowing the plaintiff to remain free on probation while he attempts to make amends to the best of his ability.

It also appears from the transcripts of the hearings that the state court felt

the plaintiff should have attempted to contact the state court to reduce his monthly restitution payments before filing for protection under the federal bankruptcy laws. This ignores the fact that the state court cannot stay the collection actions of other creditors while it considers plaintiff's financial condition. The bankruptcy court and the bankruptcy laws, however, are specifically designed to offer such protection while the debtor attempts to resolve his financial problems. This also ignores the fact that the plaintiff has the right to file for relief under the bankruptcy laws without seeking permission from the state court.

B. The Writ of Habeas Corpus is Not the Debtor's Exclusive Remedy.

The defendants argue that plaintiff seeks an order releasing him from custody and that such relief must be obtained, if

at all, through a writ of habeas corpus. The state relies heavily upon Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827 (1973) for this proposition. In Preiser, the court held that, in determining whether the habeas corpus statutes, 28 U.S.C. [Sections] 2241 and 2254, control over the potentially conflicting provisions of the Civil Rights Acts, 42 U.S.C. [Section] 1983, Congressional intent revealed that the habeas statutes control:

> "In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings." (emphasis added.) Id. at 489-90.

While it may be true that there is no clear indication that the Civil rights Act was intended by Congress to provide an

alternative to the habeas statutes, such is not the case in bankruptcy.

In 1978, Congress passed the Bankruptcy Reform Act (the "Code") which has been codified at 11 U.S.C. [Section] 101 et seq. Section 105(a) of Title 11 provided then, as it does today, that:

> "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

The legislative history accompanying that section indicates that Congress intended to give the court as much power as possible to issue <u>any</u> order necessary or appropriate to carry out the provisions of the Code:

> "Section 105 is similar in effect to the All Writs Statute, 28 U.S.C. 1651, under which the new bankruptcy courts are brought by an amendment to 28 U.S.C. 451. HR 8200 [Section] 213. The section is repeated here for sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not

> encompassed by the All Writs Statute. This section is also an authorization under 28 U.S.C. 2283, for a court of the United States to stay the action of a state court." HR Rep. No. 595, 95th Cong., 1st Sess. 316-317 (1977).

It is important to note that Congress intended to bring the bankruptcy courts within the purview of the All Writs Statute, 28 U.S.C. [Section] 1651, by amending 28 U.S.C. [Section] 451 at the time the Code was adopted. The All Writs Statute, as the name implies, authorizes courts to issue writs of all kinds, including writs of habeas corpus. It is apparent from the legislative history just recited, that writs of all kinds, including writs of habeas corpus, were considered by Congress when it adopted [Section] 105(a). If Congress had intended to limit the court's ability to order a prisoner's release to the issuance of a writ of habeas corpus, it surely would have so indicated.

Instead, Congress authorized the bankruptcy courts to issue any order necessary or appropriate to carry out the provisions of the Code.

The fact that Congress' effort to give bankruptcy courts as much power as possible was later limited by the holding in Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858 (1982), does not change the conclusion. The relevant inquiry, after Preiser, is Congressional intent concerning the exclusivity of the habeas remedy in a bankruptcy context. Congress could have limited the scope of [Section] 105(a) when it amended the Code in 1984 to attempt to cure the defects noted in Marathon. Instead, [Section] 105(a) was left intact and the legislative history indicated that [Section] 105 was amended by adding subsection (c) to make "the necessary

modifications to accommodate the continued jurisdiction of the District Court and its officers." (Emphasis added.) 130 Cong. Rec. S6085, daily ed. May 21, 1984. **(Note 3)** This court therefore concludes that Congress did not intend to limit the federal courts, in the bankruptcy context, to the habeas statutes. Thus, the holding in Preiser is not controlling in this case and the plaintiff's potential remedies include an appropriate order pursuant to 11 U.S.C. [Section] 105(a) as well as a writ of habeas corpus.

Even if the habeas statutes were the exclusive remedy available to the plaintiff in this case, it does not follow, as the defendants argue, that the complaint must be dismissed. The defendants argue that the habeas statute, 28 U.S.C. [Section] 2254, requires that plaintiff exhaust his state remedies before he may seek a writ of

habeas corpus and that he has not yet done so. This argument ignores the express language of the statute in question.

28 U.S.C. [Section] 2254(b) provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the court of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." (Emphasis added.)

Thus, if the court finds that circumstances exits that would render the state appeals process ineffective to protect the plaintiff's rights, the plaintiff need not exhaust his state remedies.

In this case, the plaintiff exercised his right to file a bankruptcy petition under the laws of the United States. At the time he did so, he was a free man. As

noted above, solely as a result of exercising a lawful right, the state court deprived the plaintiff of his liberty. This action severely undermined, if not destroyed, the plaintiff's rights under federal bankruptcy law. This action was also taken in violation of the automatic stay, as discussed earlier.

If the plaintiff is precluded from bringing the matter before the federal courts, he is forced to appeal to the state court system. The record reflects that the plaintiff's request for a stay of incarceration pending appeal was denied by the state court. The plaintiff is now incarcerated and is left with the delay and uncertainty attendant an appeal in the state system. See O.R.S. Chapter 138.

If the defendants had agreed to release the plaintiff while he pursued his state appeal rights, the defendants'

argument would be more persuasive. When asked if this was acceptable, however, counsel for the defendants advised this court that it was not. Thus, the plaintiff's remedies under state law are ineffective.

It must also be remembered, as just discussed, that this court, as a unit of the U.S. District Court, is charged with administering the federal bankruptcy laws as envisioned by the U.S. Constitution and as adopted by Congress. Said Constitution and laws are the supreme law of the land.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . .shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Article VI, cl. 2.

There is ample precedent for the proposition that a federal court will intervene in state court proceedings where

there is an interference by the state court with the federal constitution or federal laws. For a discussion of this principle, see Minnesota v. Brundage, 180 US 499, 21 S.Ct. 455 (1901).

It has also been held by the Supreme court that exhaustion is not necessary or appropriate where the state court is acting without jurisdiction. Ohio v. Thomas, 173 U.S. 276, 19 S.Ct. 453 (1899). The Supreme Court has also held that a petition in bankruptcy deprives a state court of jurisdiction to rule on matters affecting the debtor or property of the estate. Kalb v. Feuerstein, 308 U.S. 433 (1940). In this case, the state court was deprived of jurisdiction to revoke the plaintiff's probation for failure to make payments immediately following the filing of the bankruptcy petition. It would not make sense to require the plaintiff to pursue

remedies in a court that had no jurisdiction to rule on the question in the first place. It is axiomatic that the law does not require a futile act.

The legal basis for the plaintiff's argument that his probation cannot be revoked arises solely under the federal bankruptcy laws. The state court is not the proper forum for the resolution of this issue. There is no reason to require the plaintiff to seek relief through the state appeals process when that court lacks jurisdiction and complete and immediate relief can be granted by the federal courts.

Accordingly, even if the habeas corpus statutes were the exclusive remedy available to this plaintiff, this court would rule that the complaint be treated as a petition for a writ of habeas corpus and that circumstances exist that would render

the state process ineffective and, therefore, the plaintiff is not required to exhaust his state remedies before proceeding in federal court.

C. Does the Bankruptcy Court have the Power to Order the Release of the Plaintiff?

The defendants correctly point out that there is some question as to this court's power to order the release of the plaintiff. After Marathon, supra, it is unclear whether such an order would require execution by an Article III judge rather than an Article I bankruptcy judge. While there is some question whether this court can effectively order the plaintiff's release, there is no question that the U.S. District Court has the power to enter such an order. This court, for the reasons discussed above, hereby recommends to the U.S. District Court for the District of

Oregon, that an order be entered requiring the defendants to immediately release the plaintiff. A proposed order is attached hereto as Exhibit "A".

D. Must the State Court Judge be Dismissed as a Party to this Proceeding?

The defendants argue that the state court judge who violated the stay was acting in his official capacity. They point out that there is no allegation to the contrary in the complaint and no basis for the judge to be named as a party in his individual capacity.

The complaint seeks declaratory relief and a mandatory injunction requiring the release of the plaintiff. There is no express request for relief against the judge in his individual capacity for violation of the plaintiff's rights other than by way of requiring that court to order the release of the plaintiff.

Accordingly, the court will enter an order dismissing the complaint as to the judge in his individual capacity without prejudice to the plaintiff's rights to assert any legally cognizable claim for damages he may have against this individual under applicable state or federal law and without implying that he is not required to take any official action necessary to carry out any order entered by this court and the U.S. District Court in this proceeding.

Conclusion

The court will enter an order granting summary judgment in favor of the plaintiff. The judgment shall void the state court judgment revoking the plaintiff's probation and recommend that the United States District Court enter an appropriate order requiring the state to immediately release the plaintiff from custody on the condition that he comply with all the conditions of

his probation except for the payment of the restitution and compensatory fine obligations. The payment of those obligations is governed by the plaintiff's confirmed chapter 13 plan. This opinion constitutes the court's findings of fact and conclusions of law in accordance with B.R. 7052 they will not be separately stated.

DATED this 7th day of May, 1991.

/s/ Henry L. Hess, Jr.
Henry L. Hess, Jr.
Bankruptcy Judge

cc: Michael R. Blaskowsky
Daniel Rosenhouse

Exhibit "A"

[Caption and Title Omitted]

The United States Bankruptcy Court having entered its opinion and order herein and this court having adopted the findings and conclusions contained therein, now,

therefore, it is hereby

ORDERED that the defendants in this adversary proceeding cause the immediate release of plaintiff, Scott Matthew Hucke, from custody on the condition that Hucke comply with all the provisions of the original sentencing judgment dated May 31, 1990. This order does not excuse Hucke from complying with all of the provisions of the original sentencing judgment with the exception of the provisions concerning the payment of the restitution and compensatory fines. If the chapter 13 case is dismissed or converted, the original sentencing judgment shall again become effective in its entirety.

DATED this _____ day of May, 1991.

_____

United States District
Court Judge

Recommended for entry:

/s/ Henry L. Hess, Jr.
Henry L. Hess, Jr.
Bankruptcy Judge

Notes

1. The defendants do not point to any specific fact that supports the claim that the plaintiff is any greater threat to society today than he was when he was released on probation by the state court.

2. The fact that Congress has subsequently amended the law to except restitution obligations from the discharge provisions of chapter 13 does not change the result. This case was filed before that law became effective. Further, in changing the result mandated by Davenport, Congress could have, but did not amend [Sections] 362(a) or 362 (b) to except probation revocation proceedings from the scope of the automatic stay. There is no reason to conclude that Congress intended chapter 13 debtors to be subject to imprisonment for a probation violation relative to a restitution obligation that is dealt with in a chapter 13 plan. This is true since it is possible for a debtor to propose to repay a restitution obligation in full under a chapter 13 plan yet under different terms than those ordered as a result of the criminal proceedings.

3. The defendants also argue that the fact that 28 U.S.C. [Section] 2256 never became effective evidences Congress's intent to limit habeas powers in the bankruptcy context. As plaintiff correctly notes, however, the same fact could be used to argue that Congress did not intend to limit the court's habeas powers in the bankruptcy context. Perhaps the most likely explanation for this anomaly in the law is that Congress was attempting to deal with the problems posed by the ruling in Marathon, rather than attempting to limit the scope of [Section] 105(a). As discussed elsewhere in this opinion, Congress amended [Section] 105 in 1984 by adding subsection (c). This would have been the ideal opportunity to limit the scope of [Section] 105(a) vis-a-vis the habeas corpus statutes, yet Congress did not do so.

APPENDIX D

Full Text Of 11 U.S.C. Section 362(a)

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement

of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

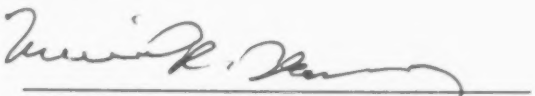
Full Text Of 11 U.S.C. Section 362(b)(1)

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor.

TRUE COPY CERTIFICATE

I hereby certify that the foregoing copy of the "Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit" is a true copy of the original.



Michael R. Blaskowsky
Attorney For Petitioner